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No. 80-5887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD H. WHITE, *Petitioner*,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, *et al.*, *Respondents*.

On A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

STATEMENT

Petitioner has filed this Reply Brief primarily to point out that certain concessions made by respondents make Rule 59(e) wholly inapplicable to the fee request in this case. Most pertinent is respondents' concession that there is no final order to which Rule 59(e) of the Fed. R. Civ. P. can apply where an attorney's fee request is raised formally in a pleading or otherwise informally and remains unresolved following a judgment on the merits of a case.

On the ethical issue, petitioner particularly wishes to bring to this Court's attention the fact that the Committee on Professional and Judicial Ethics of the New York City Bar Association recently ruled that simultaneous negotiation of the merits and of statutorily authorized fees is unethical.

ARGUMENT

I. A Request For Fees Is Not And Cannot Be Subject To Rule 59(e) In View Of The Language Of The Fees Act, Of The Nature Of A Fee Determination As Analyzed In This Court's Decision In *Sprague*, And Particularly Of The Concessions In The Brief For Respondents

A. Faced with Congress' chosen language in the Fees Act authorizing courts to allow "a reasonable attorney's fee as part of the costs," respondents raise several arguments about why this should not be so. [1] Respondents' arguments are singularly unpersuasive.

After asserting that the language of the Fees Act essentially was borrowed from the fee authorization in Title II of the Civil Rights Act of 1964, respondents curiously rely on a statement in the Senate Report accompanying the Senate Bill which did not become Title II for the proposition that attorney's fees were not independently available under Rule 54(d) of the Fed. R. Civ. P. without a statutory authorization of fees. *See* Resp. Br. at 8 n.2. Whatever respondents' point may be here, it is important to recognize that the Senate Bill on Title II did not authorize fees at all, that § 204(b) of the House Bill changed matters by authorizing "a reasonable attorney's fee as part of the costs," that both the Senate and House Reports recognized that if fees were to be authorized they would be allowed as part of the costs, that the House Bill was enacted, and that Title II thus authorizes "a reasonable attorney's fee as part of the costs," 42 U.S.C. § 2000a-3. [2]

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[1] Omitted entirely from Respondents' Brief is any discussion about the contemporaneous understanding of the meaning of "costs" in Fed. R. Civ. P. Rule 54(d) at the time the rule was adopted. As is set forth in detail in the Brief for the Lawyers' Committee and for the Massachusetts Bar Association, Amici Curiae, at 9-12, the contemporaneous understanding was that statutorily authorized fees *were* part of the costs allowable under Rule 54(d). In this sense, the historical approach taken by this Court in *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), supports the petitioner here. *See also* Pet. Br. at 11-12 n.5.

[2] The Senate Report accompanying S. 1732 stated that an authorization of fees "is omitted from this bill," that attorney's fees without a statutory authorization "are not costs as that term is used in Rule 54(d)," and that, accordingly, "no attorney fees could be allowed either party under this bill as

Also relevant if not conclusive on the procedural meaning of Title II's fee authorization — and hence of the procedural meaning of the Fees Act — is *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402-03 (1968), where this Court in a unanimous per curiam decision adhered precisely to the intent of Congress and to the language used by Congress in directing that "the District Court on remand should include reasonable counsel fees as part of the costs to be assessed against the respondents." [3] Since this Court's decision in *Newman* was repeatedly relied on in the legislative history of the Fees Act, *see* S. Rep. No. 94-1011, 94th Cong., 2d Sess., 3, 4 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 2, 6, 9 (1976), there can be no doubt that Congress meant what it said in the Fees Act: that fees are to be awarded "as part of the costs."

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part of the costs." S. Rep. No. 872, 88th Cong., 2d Sess. (1964), *reprinted in* [1964] U.S. Code Cong. & Ad. News, 2355, 2360. The Senate Bill was not enacted.

The House Report accompanying H.R. 7152 pointed out that § 204(b) of the House Bill "permits the court in any action commenced pursuant to this title to allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* [1964] U.S. Code Cong. & Ad. News, 2391, 2396. The House Bill's authorization of "a reasonable attorney's fee as part of the costs" was enacted in the Civil Rights Act of 1964, Pub. L. No. 88-352, § 204(b), 78 Stat. 241, *reprinted in* [1964] U.S. Code Cong. & Ad. News, 287, 291.

[3] The trial court in *Newman* also was aware that counsel fees, if they were to be allowed, were to be awarded as part of the costs. After awarding judgment to the plaintiffs, but only in part, the trial court ordered that "costs exclusive of attorney's fees are hereby awarded to plaintiffs." 256 F.Supp. 941, 953 (D.S.C. 1966). Following an appeal to the Fourth Circuit *en banc* and to this Court involving the availability of fees, this Court held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," and thereby directed that "the District Court on remand should include reasonable counsel fees as part of the costs to be assessed against the respondents." 390 U.S. at 402-03 (1968).

B. In response to this Court's decision in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 170 (1939), holding that a fee request is "not a request for a modification of the original decree," respondents assert that *Sprague* should be limited to common fund cases on the ground that common fund defendants have "no interest" in common fund fee awards. Resp. Br. at 21, 22. The fallacy of this proposition not only is explained in Pet. Br. at 21-22 n.17, and not only is evident from the fact that common fund defendants repeatedly appeal fee awards, *see, e.g., Pitchford* v. *Pepi, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *cf., Boeing Co.* v. *Van Gemert*, 444 U.S. 472 (1980), but in fact is admitted by respondents later in their brief when they refer to a common fund fee settlement as part of the losing defendant's "liability to the prevailing party," Resp. Br. at 30.

With their misplaced focus, respondents never attempt to distinguish the fact that "the inquiry [involved in making fee awards] is a collateral one, having a distinct and independent character" since "they are contingent upon the exigencies of equitable litigation." *Sprague* v. *Ticonic National Bank, supra*, 307 U.S. at 168-69; *see also, Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974). And nowhere do respondents attempt to distinguish *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, 651 F.2d 574 (8th Cir. 1981), where the Eighth Circuit properly followed this Court's analysis in *Sprague* applying it to a request for fees under the statutory authorization in Title VII and under the bad faith exception. *But see* the improper limitation in *Obin* discussed in Pet. Br. at 20-21 n.16. Respondents, in short, do not and cannot distinguish the analytic grounding of *Sprague*.

C. Addressing Rule 59(e), respondents attempt to support the First Circuit's decision by arguing that a fee award is an integral part of the merits of a case. Resp. Br. at 16-29. But, even assuming arguendo that fees are not an item of costs as specified by Congress and are not collateral to and independent from the merits as this Court held in *Sprague*, respondents' Rule 59(e) argument is not at all helpful. Nowhere do respondents provide any analysis of the origin, intended meaning, or ordinary application of Rule 59(e), *compare* Pet. Br. at 25-36, and nowhere do they apply such an analysis to this case.

Most surprisingly, respondents all but *concede* the inapplicability of Rule 59(e) to this case through their admission that fee requests involve subsequent evidentiary hearings, through their admission that Rule 59(e) does not apply to fee requests in which attorneys are asserting a right of their own, and through their admission that Rule 59(e) does not apply to an unresolved fee claim raised in the course of litigation.

1. Respondents candidly concede that a fee request, following a resolution on the merits, "can be determined in a subsequent court hearing, at which time the parties would present their evidence." Resp. Br. at 29. "The subsequent hearing is the forum for proof of the claim, and its timing would no doubt be sensitive to the needs of both parties to prepare their respective submissions." *Id.* It certainly is true, as the courts have widely recognized, that fee requests often involve separate evidentiary hearings. *See* Pet. Br. at 23-25. But it also is true that Rule 59(e) was *not* designed as a notice rule to initiate consideration of new evidentiary matters not previously presented to a court. *See* Pet. Br. at 25-36. Quite to the contrary, Rule 59(e), with its short time period and its suspension of judgment, does nothing more than allow a court to reconsider matters already fully presented. *Id.* [4]

2. Respondents also concede that Rule 59(e) is not applicable to a fee request "when an attorney seeks to enforce a right of his own." Resp. Br. at 20-21. This concession wholly undermines respondents' argument since respondents admitted in the trial court that "the attorneys' fees go to the attorneys directly." J.A. 88, and since the fee award here was made to petitioner's "counsel," *id.* at 80. This, in fact, is common practice. Although the Fees Act authorizes fees for a

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[4] Although subsequent evidentiary hearings are entirely inconsistent with Rule 59(e), it should be pointed out that the First Circuit itself discounted the actual and intended meaning of Rule 59(e) — which has been held to be jurisdictional, *see* Pet. Br. at 27 n.24 — by suggesting in dicta that "[e]ntry of judgment which determines all matters except fees and includes an express reservation of the issue of fees, is a possible option" to circumvent Rule 59(e). J.A. 106. This suggestion was recently followed in *Bacon* v. *Toia*, 648 F.2d 801, 809-10 (2d Cir. 1981), a case in which the Second Circuit rejected the application of Rule 59(e) to a fee request on this ground.

"prevailing party," and although fee requests under statutory authorizations as well as under the common fund theory are usually made in the name of the party, the courts have uniformly held that they also may be made *by counsel*, *see* Pet. Br. at 16 n.10, and they in any event are uniformly awarded *to counsel*, *id.* at 14-16. This reality, recognized and implemented by the courts, conforms with Congress' intent in enacting the Fees Act, *id.* at 34-35 n.30, 40. The intent that fees are to be awarded *to counsel* also is demonstrated by Congress' reliance on three illustrative fee computation cases, *see* S. Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976) with the court in each case having awarded fees expressly to the prevailing parties' "counsel" or "attorneys." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483, 486 (W.D.N.C. 1975); *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 688 (N.D.Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E.P.D. ¶ 9444, at 5049 (C.D.Cal. 1974).

3. Finally, respondents concede that "[a] judgment which does not adjudicate all pending claims for relief, including an unresolved claim for attorney's fees, is not a final judgment for the purposes of Rule 59(e)." *See* Resp. Br. at 17. "Where a prejudgment request for fees has been made, the remedy has been preserved, and the judgment will not be final until the request is resolved." *Id.* at 26. Respondents appear to contend that these concessions, which are based on several courts of appeals' decisions,[5] do not bar the application of Rule 59(e) to a case such as this either because petitioner's pre-Fees Act complaint did not expressly request fees in the prayer for relief, *id.* at 16-20, 26-29, or because there had been no action taken in this case "putting the adverse party on notice" of an intent to seek fees, *id.* at 28. Respondents seem to assert that in either situation, a judgment on the merits not addressing fees is somehow transformed into a final judgment for purposes of Rule 59(e).

There are two fatal defects in respondents' unique theory of notice pleading. First, under Rule 54(c), any failure to request fees in the ad

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[5] The courts of appeals' decisions — flowing from this Court's decision in *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976) — which support the proposition that a judgment is not final until there is a fee award are cited in Pet. Br. at 32-33 n.27, and in Resp. Br. at 17, 27 n.16. *See also Anderson* v. *Morris*, 658 F.2d 246 (4th Cir. 1981).

damnum clause of a pleading does not and cannot affect an entitlement to fees as part of the final judgment on the merits. Second, since respondents here were put on notice of the fee issue prior to settlement of the merits, the second part of their theory is not applicable to this case.

Rule 54(c) provides in relevant part: "Except as to a party against whom a judgment is entered by default, *every final judgment* shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings*." Fed. R. Civ. P. 54(c) (emphasis added). There is no dispute as to the meaning of this rule: "Rule 54(c) continues the story [of liberalized pleading under the Fed. R. Civ. P.] by providing that, except as to a judgment by default which shall not be different in kind from or exceed the amount prayed, every other final judgment shall grant the relief to which the party in whose favor it is rendered is entitled." 6 J. Moore, Federal Practice, ¶ 54.60, at 1212 (2d ed. 1981). Since "[a]n amendment of the prayer is not necessary to obtain the substantive relief to which the claimant is entitled," a party is entitled to receive relief in a final judgment quite different from that which was formally requested: "A party may be awarded damages even though equitable relief was prayed for; or may be granted equitable relief although money damages were prayed for; and the court may award equitable relief of a different nature than that sought by the prayer." *Id.* at ¶ 54.62, 1264, 1268-69 (footnotes omitted). Such additional relief unquestionably may include attorney's fees. *Id.* at 1271 n.31; *see Stroud* v. *B-W Acceptance Corp.*, 372 F.2d 185, 189 (10th Cir. 1967); *Paliaga* v. *Luckenbach Steamship Co.*, 301 F.2d 403, 410 (2d Cir. 1962). In fact, even a party that expressly waives a form of relief such as back pay is not barred under Rule 54(c) from later obtaining such relief. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 407, 423-25 (1975). "In brief, it is the duty of the court to grant the relief to which a party is entitled irrespective of the prayer for relief in the pleadings." 6 J. Moore, Federal Practice, ¶ 54.62, 1271 (2d ed. 1981). Since there was an entitlement to and an award of fees here, there thus was no final judgment under Rule 54(c) to which Rule 59(e) could apply until the evidentiary fee issue was resolved.

Respondents' theory also does not fit the facts of this case. As we pointed out in our opening brief, fees were initially discussed during

the settlement negotiations on the merits but such discussion was discontinued because, as respondents' counsel later conceded, "there was an ethical problem in discussion of the attorneys' fees," J.A. 88, in that it was unethical to "hold a class action or consent decree hostage for a waiver of attorneys' fees," *id.* at 69. *See generally* Pet. Br. at 3-5. Since respondents' attorneys thus were aware of the Fees Act, were familiar with the court decisions thereunder, and recognized that they could be subject to an award of fees, there thus was no prejudice to respondents whatsoever when petitioner's counsel initiated fee negotiations five days after entry of the consent decree, and later formally requested court-awarded fees.

Accordingly, under respondents' own theory and particularly in view of their concessions, the settlement decree resolving the merits of this case was not final and Rule 59(e) hence was inapplicable; the trial court thus acted within its jurisdiction in addressing and awarding fees, and the decision of the First Circuit must be reversed.

II. Despite Respondents' Altered Position, A Requirement Of Simultaneous Negotiation Of The Merits And Of Fees Imposes Ethical Conflicts

In the trial court, respondents were of the view that it was unethical to request petitioner's class counsel to engage in simultaneous negotiation of the merits and of fees. J.A. 69, 88. *See generally* Pet. Br. at 3-5. Nevertheless, in an attempt to provide some grounding for the First Circuit's "require[ment that] the parties face up to the issue of fees in their settlement negotiations," J.A. 106, respondents have now diametrically reversed their position.

In support of their new position, respondents incorrectly state that "[t]he approach followed by the First Circuit harmonizes with" *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1020-21 (3d Cir. 1977), and *Mendoza* v. *United States*, 623 F.2d 1338, 1352-53 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).[6] To the contrary, the Third

[6] Respondents also incorrectly rely on a statement, taken out of context, in the *Manual for Complex Litigation*. The relevant provision, omitted by respondents, is as follows: "When counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees there is an inherent conflict of interest." *Id.* at 1.46, *reprinted in* 1, Pt. 2, J. Moore, Federal Practice, 1.46, at 74 (2d ed. 1981).

Circuit in *Prandini* rejected simultaneous negotiation as unethical and held that only after "court approval" of a settlement on the merits "should discussion and negotiation of appropriate compensation for the attorneys begin." 557 F.2d at 1021. The consecutive negotiation procedure outlined in *Prandini* in fact was the precise procedure followed here, J.A. 45, 84, *see* Pet. Br. at 3, a procedure subsequently disapproved by the First Circuit in this case.

The simultaneous negotiation required by the First Circuit not only is in conflict with the court decisions in *Prandini*, *Mendoza*, and *Regalado* v. *Johnson*, 79 F.R.D. 447, 451 (N.D.Ill. 1978), but also is in conflict with the *only formal ethics opinion* on this matter of which counsel for petitioner are aware. *See* Opinion No. 80-94 of the Committee on Professional and Judicial Ethics of the New York City Bar Association, 36 Record of N.Y.C.B.A. 507 (1981). As concluded therein, "we consider it unethical for defense counsel to attempt to negotiate the fee award under [fee-shifting] statutes simultaneously with the negotiation of the settlement of the merits." *Id.* at 511. For the convenience of the Court, a copy of this ethics opinion has been lodged with the Clerk of the Court.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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